

COPYRIGHT PROTECTION OF FASHION DESIGNS CUSTOMIZED VIA APPS IN THE EU AND THE US

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ABSTRACT

Copyright grants the authors exclusive right over their original intellectual creations. It has long been accepted that the mentioned intellectual creations entailed literature, visual art, photographs, music, films, plays, choreographies, even architecture. However, in the EU and the US, fashion designs, although sometimes colloquially pegged as “works of art”, rarely enjoyed same copyright protection as the abovementioned list of works. The inconsistency in obtaining protection and, according to designers, often unsatisfactory application of copyright legislation to fashion designs presented issues that are yet to be resolved by copyright regulation. The number and relevance of mentioned issues grows as the fashion industry’s incessant fast-pace development introduces a constant influx of new legal challenges. This is well-shown on the example of the growing popularity of online apps that enable customers to customize their clothes upon purchase. Taking into consideration current copyright regulation in the EU and the US, which are relevant and progressive fashion markets where custom-clothing apps are likely to be embraced, the prospect of copyright over such app-customized goods challenges the basic notions of copyrightability, raising the questions if and how can copyright protection in said jurisdictions extend to app-customized designs, and, finally, should it. The answers to the said questions are pertinent as designers, although acknowledging the relevance of copyright protection, tend to navigate through legal regulation thereof without a clear image of the limits within which they can operate, with the issues becoming exacerbated when the customer becomes a collaborator in the designing process. Also, the unclear limits and the lack of awareness of said limits contribute to the issue of misappropriation of fashion design, which are particularly detrimental to small and unestablished fashion houses or designers.

Therefore, by examining relevant legislation, case law and scholarly articles, this thesis will analyze current copyright protection of fashion designs in the EU and the US, evaluating the optimum amount of protection fashion designs should enjoy to preserve incentives for future innovation, as well as address the scope of copyright protection of fashion designs customized via apps; particularly whether such app-customized fashion designs fulfilled the legal criteria necessary for copyright protection in mentioned jurisdictions, especially focusing on the originality requirement and the question of who becomes the author of such works. Furthermore, it will examine whether copyright offers the most effective legal protection for app-customized fashion garments, or would other intellectual property rights, namely trademarks and industrial designs/design patents, be better suited for such task. It will be argued

that the EU copyright regime and particularly unregistered industrial design protection, struck a better balance between granting protection of fashion designs and leaving enough space for innovation, while the narrow scope of US copyright protection and a lack of appropriate alternative nurture an environment of idea appropriation that led to frustration of both scholars and the fashion industry, especially of unestablished designers vulnerable to misappropriation of fashion designs by larger or more influential fashion houses.

INTRODUCTION

In the recent years, customization of products to match the customers' needs and wishes has taken most industries by storm, including the fashion industry.¹ All forms of technology, including shopping apps, 3D printers, robotized factories etc., enable fashion designers to offer bespoke fashion garments easier, quicker and cheaper than ever before.² Although originally introduced by smaller brands trying to distinguish themselves in the highly populated fashion markets, big players in the fashion industry have embraced the trend as well,³ and customers can now create anything from their personalized Timberland shoes and Adidas shirts, to luxury fashion items like Louis Vuitton luggage or Dolce and Gabbana sneakers.⁴ In other words, pursuit for uniqueness is no longer reserved for fashion designers; nowadays it is the customers who expect their products to be one-of-a-kind. With both fashion designers and customers now striving for the achievement of uniqueness, it is likely that legal battles against copycats will become more frequent and the question of copyrightability of fashion garments highly pertinent, once again revisiting the issue of balance between protecting current innovation and incentivizing future innovation.

Generally, copyright protection is an exclusive property right granted to persons (authors) who created literary, artistic and scientific works. Authors are usually defined as physical persons who created the work.⁵ Protection emerges automatically upon creation of the work and, both in the EU and the US, covers the life span of the author and 70 years *post mortem*, irrespective of the date when the work was lawfully made available to the public.⁶

The author is not entitled to protection of the idea behind the author's work, but only the expression thereof. Namely, ideas are considered as "*building blocks toward everyone's creativity*"⁷ which should not be monopolized by any single person. This principle applies even if the idea itself is completely original and attributable to one author: such idea will become free to use by others, while its creator will enjoy protection for his or her expression thereof.⁸

¹ Aviva Freudmann, Customers Want Customization, and Companies Are Giving It to Them, <https://www.nytimes.com/2020/03/18/business/customization-personalized-products.html>

² Ibid.

³ Ibid.

⁴ <https://www.trendhunter.com/protrends/luxury-customization>

⁵ Jane Ginsburg, *The Oxford Handbook of Intellectual Property Law*, ed. Rochelle Dreyfuss, Justine Pila (2018) Oxford University Press

⁶ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 12–18 Art. 1; 17 U.S. Code §302

⁷ *Supra* 5

⁸ Edward Samuels, 'The Idea-Expression Dichotomy in Copyright Law' (1989) 56 Tennessee Law Review 321

The line between an idea and an expression is necessarily subjective and should be set on a case-by-case basis,⁹ pursuant to the objectives of copyright: to offer sufficient protection of authors' rights without impeding future authors' exercise of their creativity and building on pre-existing works.¹⁰ Additionally, to enjoy copyright protection, the author's expression should be original.¹¹ The EU and the US share the view that the originality requirement should be defined broadly and that the threshold for enjoyment of copyright protection should be set low.¹² Further information on the originality requirement will be provided in the following chapters.

Coming back to the issue of fashion design copyrightability, and particularly of custom designs, current copyright regimes are often considered inappropriate or insufficient to stand up to challenges presented by the ever-faster and more dynamic changes in the fashion industry.¹³ It is questionable how traditional copyright regimes will grapple with the exceeding digitalization of designing process. An example of such digitalization can be found in the collaboration of the fashion designers and their customers to create a fashion garment via apps, whereby the designers create design features that are then programmed into apps, and the app-users, i.e. the customers, select and arrange such design features to their liking to create the end-products. It is likely that the number of such technology-driven collaborations will be on a rise in the near future, as apps present the simplest method of implementation of customer's input into a product.

Therefore, based on legislation, case law, and scholarly articles, this thesis will analyze whether fashion designs customized by virtue of an app fulfilled the legal criteria necessary for copyright protection in the EU and the US, which are arguably the biggest fashion markets where such apps would be embraced. Special focus will be set on the questions who becomes the author of such designs and whether such designs are capable of having sufficient originality to be entitled to copyright protection. Also, it will be evaluated whether designers or app-users would benefit from the protection granted by other intellectual property rights, i.e. trademarks and industrial designs/design patents, more than they would from copyright protection. In addition, the thesis will probe whether a more stringent IP protection is beneficial for fashion designs in general,

⁹ Atari Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir. 1982)

¹⁰ Nash, 899 F.2d 1540-41

¹¹ Supra 5

¹² Ibid.

¹³ Anna M Luczkow, 'Haute off the Press: Refashioning Copyright Law to Protect American Fashion Designs from the Economic Threat of 3D Printing' (2016) 100 Minnesota Law Review 1131; Brandon Scruggs, 'Should Fashion Design Be Copyrightable' (2007) 6 Northwestern Journal of Technology and Intellectual Property 122

and especially app-customized designs, or would a lack thereof equally fulfill the goal such stringent protection is trying to achieve, but without unnecessary litigation.

The first chapter will present an overview of current copyright protection of fashion designs in the EU and the US, especially focusing on leading case law, and show that the more expansive copyright protection in the EU brought more legal certainty to authors, and in fact offered more incentives for innovation than the limited copyright protection in the US, especially for unestablished designers that are particularly vulnerable to misappropriations by large and (financially) powerful fashion houses. The second chapter will analyze whether the current copyright regime could be applied to fashion designs that are co-created by designers and app users, particularly focusing on the authorship over such work and the originality thereof. I will argue that both designers and app-users could be considered as authors entitled to copyright protection; however, the objects thereof would not be the same. While the designers are entitled to copyright over the design features, the app-users enjoy copyright protection of the arrangement of design features, provided that the design features and their arrangement fulfilled other copyrightability criteria. Regarding the originality requirement, I will argue that both the designer and the app-user could create works capable of meeting the originality threshold to obtain copyright in the EU. In the US, while both the designer's and the app-user's works could meet the very low originality threshold, the app-user's copyright is limited only to an original arrangement of design features that result in a new design feature (and not the fashion garment in its entirety), which would significantly restrict enjoyment of app-user's protection.

Finally, despite the eligibility of app-customized fashion designs or features thereof for copyright protection, authors might be unsatisfied with the scope thereof, as the low level of originality commonly associated with fashion designs correlates to a lower level of protection. Therefore, the final chapter will discuss whether other intellectual property rights, e.g. trademarks or industrial designs in the EU and design patents in the US, which protect the outer appearance of products, offer better protection, or at least a viable alternative to copyrights. I will argue that EU industrial design protection could be considered as an adequate alternative thereto, particularly due to its optional registrability and the lack of necessity to prove the validity of the industrial designs in litigation,¹⁴ with the short-term protection of unregistered industrial design rights striking the best balance between providing protection and incentivizing innovation in the most common case of seasonal and trend-dependent fashion designs.

¹⁴ Whereas the originality requirement in copyright infringement cases is frequently challenged.

However, the same cannot be said about the US design patent protection, with its numerous potentially challenging requirements for registration which would likely dissuade designers and app-users from pursuing such form of protection.

With regard to trademark protection, I will argue that designers and app-users would find trademarks in the EU and the US an appropriate alternative only in rare cases where the designers or app-users designed a highly unique, distinctive design feature or fashion garment. However, if acquired distinctiveness needs to be proven, it is questionable whether the designers and the app-users could prove it, and, even if so, why would they be motivated to. In these cases, automatically-emerging copyright, despite its limitations, offers the best protection for both designers and app-users.

In conclusion, the thesis will revisit the question whether an extensive protection of app-customized fashion designs is needed. I will argue that the comparison of the broader European protection and narrower US protection and the reactions of designers and scholars thereto show that an extensive protection does not hinder innovation, but in fact serves as an incentive to create, particularly in the case of small fashion houses and unestablished designers, which represent a significant driving force for innovation,¹⁵ but lack the financial means, motivation or the manpower to endure frequent design misappropriations.

¹⁵ Although there is no definitive statistics on the number of smaller fashion houses and independent designers in comparison to established fashion names, according to a 2018/2019 report by the European Commission, generally SMEs play a critical role in promoting innovation due to their prevalence and conduct of a large share of economic activity. Same report published in 2014 established that SMEs represent more than 99% of all businesses in the EU and the USA; <https://op.europa.eu/en/publication-detail/-/publication/cadb8188-35b4-11ea-ba6e-01aa75ed71a1/language-en>; <https://op.europa.eu/en/publication-detail/-/publication/2fe47dcb-9ae6-41ab-a037-a3b4d897c5ac>

1. COPYRIGHT PROTECTION OF FASHION DESIGNS

1.1. European Union

This sub-chapter will observe whether fashion designs in general qualify for copyright protection in the EU, and, if so, what is the scope of such protection. Although the so-called *InfoSoc Directive*¹⁶ addressed copyright protection of authors' works in the internal market,¹⁷ said directive did not provide a definition of the term "works". Therefore, further interpretation was left to the Court of Justice of the European Union (hereinafter: "CJEU"). The CJEU's first venture in specifying the meaning of "works" was in the *Infopaq*¹⁸ decision, where they were defined as "*subject-matter which is original in the sense that it is its author's own intellectual creation*".¹⁹ Further guidance was given in the *Levola Hengelo*²⁰ decision, where the CJEU established that, in addition to the originality requirement, works had to be expressed in a precise and objective manner to enjoy copyright protection, even if such expression was not in a permanent form.²¹ Imprecise and subjective expression of works could not be permitted due to leading to legal uncertainty over what is being protected.²² Therefore, in addition to defining the term, the CJEU established two requirements works had to fulfill for copyright protection: the requirement of originality and the capability to be expressed in a precise and objective manner.

In light of the mentioned copyrightability requirements established in *Infopaq* and *Levola Hengelo*, in the *Cofemel*²³ case the CJEU was referred a preliminary question whether fashion designs, i.e. objects of both utilitarian and aesthetic value, could enjoy copyright protection if original and expressed in a precise and objective manner. In said case, G-Star Raw CV, a famous clothes designer and producer, filed a lawsuit against Cofemel-Sociedade de Vestuário SA in Portugal, claiming copyright infringement of their T-shirt-, sweatshirt- and jeans designs, as well as a breach of national law prohibiting acts of unfair competition. Cofemel unsuccessfully based their defense on claiming that fashion designs did not fulfill the copyrightability criteria set by national law, where copyright is granted only to works of design

¹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167

¹⁷ InfoSoc Directive Art. 1

¹⁸ Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, ECLI:EU:C:2009:465, par. 37

¹⁹ *Ibid.*

²⁰ C-310/17, *Levola Hengelo v Smilde Foods BV*, ECLI:EU:C:2018:899

²¹ *Ibid.*, par. 40

²² *Ibid.*, par. 41

²³ C-683/17, *Cofemel-Sociedade de Vestuário SA v G-Star Raw CV*, ECLI:EU:C:2019:721

constituting an artistic creation.²⁴ On Cofemel's appeal, the appellate court affirmed the first-instance decision, deciding that fashion designs could benefit from copyright protection, whereby the design's aesthetic or artistic value was considered irrelevant as long as the fashion designs represented the author's own intellectual creation. Finally, the Portuguese Supreme Court questioned whether fashion designs had to fulfil the same requirements to enjoy copyright protection as artistic or literary works (i.e. the originality requirement), or should a "*specific degree of aesthetic or artistic value*" also play a part in fashion designs' copyrightability.²⁵

In light of the abovementioned, the first question referred to the CJEU was whether originality was the essential criterion of assessing copyrightability in products serving both a utilitarian and an aesthetic purpose. In addition, the CJEU was asked to address the issue of national copyright legislation offering protection only to works of art or artistic creations, thereby setting a higher, more subjective and uncertain threshold than envisaged by the EU copyright regime.²⁶ The CJEU decided that products of utilitarian and aesthetic purpose such as fashion designs were eligible for copyright protection if fulfilling the requirements set by *Infopaq* and *Levola Hengelo*. Consequently, the only requirements for fashion designs to enjoy copyright protection in accordance with EU law were the originality requirement and an expression in a precise and objective manner.²⁷ The nationally imposed threshold of artistic value was considered as contrary to EU copyright regime, as such value is necessarily a subjective estimation inconsistent with the requirement of identifying the protected subject matter in a clear and precise manner.²⁸ To fulfil the requirement of originality, it was deemed sufficient for designs to reflect "*the freedom of choice and personality of its author*".²⁹ However, the examination of the originality of a fashion design had to be thorough, taking into consideration the fashion design's visual features, as well as functional³⁰ (i.e. features indispensable for achieving the goods' functional or technical purpose).³¹

In conclusion, in the EU, fashion designs in their entirety could be considered copyrightable if sufficiently original and capable of a precise and objective expression. Although unaddressed

²⁴ Ibid., pars. 15, 19-20

²⁵ Ibid., par. 24

²⁶ Ibid., par. 25

²⁷ Ibid., par. 48

²⁸ Ibid., par. 53

²⁹ Ibid., par. 54

³⁰ Eleonora Rosati, The Cofemel decision well beyond the 'simple' issue of designs and copyright, <https://ipkitten.blogspot.com/2019/09/the-cofemel-decision-well-beyond-simple.html>

³¹ Michael Ritscher, Robin Landolt, Shift of paradigm for copyright protection of the design of products (2019) GRUR Int. 125

by the CJEU, national courts applied the *Cofemel* approach to fabrics,³² and, analogously, will likely extend *Cofemel* test to features of fashion designs.³³

1.2. United States

US Copyright Act protects original works fixed in any tangible medium of expression.³⁴ While fashion designs *prima facie* fulfilled said requirements, designers have been finding it challenging to obtain copyright protection due to the scope of protection granted by said act being limited to artistic expressions and not extending to useful articles.³⁵ According to the US Copyright Act, useful articles are products or features with an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. Articles that are normally a part of useful articles will also be regarded as useful articles.³⁶ Fashion designs as such are considered useful articles unqualified for copyright protection. However, features of fashion designs could be copyrighted if they fulfilled the so-called “separability test”, i.e. represented pictorial or graphic features that could be viewed as separate and independent elements of the utilitarian article.³⁷ Some of the copyrightable features include fabric designs, patterns, lace designs, belt buckles, embellishments, etc.³⁸ Even if fashion designers obtained protection for their copyrightable design features, the scope of protection they enjoy would be fairly narrow, with minor distinctions between their designs and infringing designs being sufficient to avoid all infringement charges.³⁹ Namely, it was established that with works the concept of which was heavily exploited by designers (e.g. floral patterns), smaller differences between designs are required for the later design to be considered original work and not a mere copy of an earlier work.⁴⁰

³² On 29 January 2020 the UK Intellectual Property Enterprise Court in decision *Response Clothing Limited v The Edinburgh Woollen Mill Limited* granted protection to a fabric design by citing *Cofemel*

³³ So far, *Cofemel* test was used in only a few, but highly different matters: a store layout in Italy and bullfighting in Spain. Therefore, it is expected that *Cofemel* will not only permeate copyright protection in the fashion industry, but also other areas of applied art.

³⁴ 17 U.S. Code §102

³⁵ US Copyright Office, Register Your Work: Registration Portal, <https://www.copyright.gov/register/va-useful.html>

³⁶ *Supra* 32, §101

³⁷ *Ibid.* §101

³⁸ Eleanor M. Lackman, *Cartwheeling through Copyright Law: Star Athletica, L.L.C. v. Varsity Brands, Inc.:* The Supreme Court Leaves as Many Open Questions as It Provides Answers about the Viability and Scope of Copyright Protection for Fashion Designs (2017) 107 *Trademark Rep.* 1251; Michele Woods, Miyuki Monroig, *Fashion Design and Copyright*

in the US and EU, https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf

³⁹ *Slifka v. Citation Fabrics Corp.*, 329 F. Supp. 1392, 1393 (S.D.N.Y. 1971)

⁴⁰ *Concord Fabrics, Inc. v. Generation Mills, Inc.*, 328 F. Supp. 1030 (S.D.N.Y. 1971)

It is particularly interesting to observe the very limited protection of fashion designs in the US in relation to the more extensive EU copyright protection. A reason for such discrepancy in approaches might be found in their historical development. At the time modern copyright laws were drafted in the US, the US was home to clothing manufacture industry. However, the designer houses were all located in Europe, some of them dating back to the 19th century.⁴¹ Therefore, in response to their needs, Europe advocated for heavy copyright protection, while the US did not see a need for such stringent laws. With fashion design industry evolving in the US, designers started feeling the consequences of the limited protection and advocated for change,⁴² which was supposed to be addressed by the Design Piracy Prohibition Act (hereinafter: “DPPA”) in 2007, by virtue of which designers would be granted protection over articles of apparel, broadly defined to include men’s, women’s or children’s clothing, bags, wallets, belts, eyeglasses, etc.⁴³ Although the scope of protection envisaged by the Design Piracy Prohibition Act was wide, the length of protection was limited to three years upon the garment’s obligatory registration with the competent authorities.⁴⁴ Furthermore, protection would be granted only against “*closely and substantially similar garments*”.⁴⁵ While the justification for adoption of such bill was predominantly utilitarian, i.e. the necessity of offering protection to the fashion industry and investments it pours into innovation,⁴⁶ prof. Susan Scafidi also emphasized the perception switch from fashion items being solely utilitarian to predominantly creative.⁴⁷ However, the bill was met with resistance from the legislators, designers and scholars who considered adoption of such bill unnecessary at best, and detrimental for innovativeness in the fashion industry at worst.⁴⁸ The bill met its fate in the US Congress, where it was finally stalled. Its descendant, the 2010 Innovative Design Protection and Piracy Prevention Act⁴⁹ was drafted similarly to DPPA, but was meant to address some of

⁴¹ Chavie Lieber, Fashion brands steal design ideas all the time. And it’s completely legal, <https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m>

⁴² Ibid.

⁴³ H.R.2196 - Design Piracy Prohibition Act, §2

⁴⁴ Ibid.

⁴⁵ Silvia Beltrametti, Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community (2010) 8 Northwestern Journal of Technology and Intellectual Property 147

⁴⁶ Hillary Shayne Adler, Pirating the Runway: The Potential Impact of the Design Piracy Prohibition Act on Fashion Retail (2009) 5 Hastings Business Law Journal 381

⁴⁷ Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 2 (2006) (statement of Susan Scafidi, Visiting Professor, Fordham Law School)

⁴⁸ Kal Raustiala, Christopher Sprigman, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design (2006) 92 Virginia Law Review 1687

⁴⁹ H.R. 2511 - Innovative Design Protection and Piracy Prevention Act

the DPPA's criticism. However, the scholars and the fashion industry again criticized this act as insufficient and lacking, leading to its non-adoption. The final attempt to regulate the issue of copyrightability of fashion designs was in 2012 with the introduction of the Innovative Design Protection Act.⁵⁰ The final bill, content-wise similar to DPPA, was again heavily criticized⁵¹ and shared the fate of its predecessors.⁵²

The reasons for the steady failure of legislation expanding the scope of copyright protection of fashion designs are numerous and highly debated by scholars.⁵³ Part of the responsibility was claimed to fall on the fashion industry itself, and its "*lethargy and lack of coordination of a united voice*".⁵⁴ Another contributing factor was the continuous probing whether protection for fashion designs would in reality bring more harm than good. The leading adversaries of extensive protection were profs. Kal Raustiala and Christopher Sprigman, creators of the "piracy paradox" theory, according to which a low level of IP protection and the consequential prompt appropriation of fashion designs are the driving forces behind innovation and designers' constant aspirations to create the "next big thing" yet to be introduced to consumers.⁵⁵ The quick turnover of new designs is accompanied by a steady profit, as consumers constantly update their wardrobe to stay in style.⁵⁶ Therefore, a stringent statutory protection would stall the fast-evolving fashion cycles and the fashion industry as we know it would inevitably change.⁵⁷

Regardless of the exact reason for the failure of the DPPA and its successors, with the copyrightability of fashion designs unaddressed by specific statutes, the US courts continued to apply numerous variations of the US Copyright Act-envisaged separability test to utilitarian-aesthetic products, leading to often conflicting and unpredictable results.⁵⁸ The US Supreme Court sought to introduce more legal certainty and attempted to introduce uniformity to the separability test's application in their decision *Star Athletica v. Varsity Brands*.⁵⁹ In this case, Varsity Brands Inc., a designer of cheerleading uniforms, sued Star Athletica LLC, claiming

⁵⁰ S.3523 - Innovative Design Protection Act

⁵¹ Casey E. Callahan, Fashion Frustrated: Why the Innovative Design Protection Act is a Necessary Step in the Right Direction, But Not Quite Enough (2012) 7 Brooklyn Journal of Corporate, Financial & Commercial Law 195

⁵² Kaitlyn N. Pytlak, The Devil Wears Fraud-a: An Aristotelian-Randian Approach to Intellectual Property Law in the Fashion Industry (2016) 15 Virginia Sports & Entertainment Law Journal 273

⁵³ Anna M Luczkow, Haute off the Press: Refashioning Copyright Law to Protect American Fashion Designs from the Economic Threat of 3D Printing' (2016) 100 Minnesota Law Review 1131

⁵⁴ Supra 45

⁵⁵ Supra 48

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Supra 38

⁵⁹ *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. ____ (2017), par. 17

that Star Athletica's cheerleading uniforms were substantially similar to Varsity Brands' copyrighted earlier designs. Star Athletica, on the other hand, claimed that the elements of the cheerleading uniforms such as colors and stripes aimed merely to identify its wearer, thereby having no aesthetic function to be protected by copyright. The first instance court decided that Varsity Brand's copyrights were invalid due to the lack of aesthetic function of cheerleader uniforms' "embellishments" (e.g. stripes, chevrons, zig-zags and color blocks). The appellate court disagreed, deciding that stripes, zig-zags and color blocks represented "fabric designs" separable from the unprotected utilitarian "dress designs" (for cheerleading uniforms, dress designs were crop tops and skirts).⁶⁰ Finally, the US Supreme Court confirmed that copyright protection could not extend to the "*shape, cut, and physical dimensions*" of the fashion item,⁶¹ but features thereof were copyrightable upon fulfillment of two requirements: the features "*(1) can be perceived as a two- or three-dimensional work of art separate from the useful article, and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.*"⁶² In other words, if a fashion design feature could be perceived as separate from the utilitarian fashion design and was a pictorial, graphic or sculptural work eligible for copyright protection on its own merits, it would also be protected by copyright when affixed to a fashion garment. Even though this decision established a uniform two-prong test that replaced a myriad of previously applied separability tests, *Star Athletica* was considered ambiguous to apply in practice,⁶³ as it told little on how to distinguish the utilitarian aspects of fashion designs from their aesthetic features.⁶⁴ Furthermore, it was claimed that the test did not promote legal certainty, as application thereof to the same fact pattern could lead to contradicting results and was highly dependent on the judge's discretion.⁶⁵

If qualifying for copyright protection, a fashion design feature will still have to fulfill the originality requirement set by the US Copyright Act. In fact, prof. Eleanor Lackman suggested that the question of originality of fashion designs will gain importance after *Star Athletica*, as the focus shifted from the copyrightability potential of apparel to the actual occurrence of

⁶⁰ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 799 F. 3d 468, 471 (6th Cir. 2015)

⁶¹ *Supra* 59

⁶² *Ibid.*

⁶³ Kshithija Mulam, *The Intellectual Property Implications of Star Athletica v. Varsity Brands*, Columbia Undergraduate Law Review, <https://www.culawreview.org/journal/the-intellectual-property-implications-of-star-athletica-v-varsity-brands>

⁶⁴ Christopher Buccafusco & Jeanne C. Fromer, *Forgetting Functionality* (2017) 166 *University of Pennsylvania Law Review Online* 119

⁶⁵ *Supra* 38; Francesca Montalvo Witzburg, 'Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and the European Union' (2017) 107 *Trademark Rep* 1131

copyright infringement in a specific case.⁶⁶ Regarding the necessary level of originality, the US courts set a very low threshold for works to be considered original and creative.⁶⁷ The US Supreme court in their landmark decision *Feist* established that works needed to possess only “some minimal degree of creativity”, a “modicum of creativity” or a “minimal creative spark” to constitute a copyrightable expression.⁶⁸ More specific guidance on the necessary level of originality can be found in US Copyright Act, which established that familiar symbols or designs, mere variations of typographic ornamentation and lettering or coloring were not subject to copyright protection.⁶⁹ However, an arrangement of features that did not enjoy copyright protection *per se*, could result in a copyrighted item.⁷⁰

To conclude, fashion designs *per se* were not eligible for copyright protection in the US due to their predominantly utilitarian function. However, features thereof could benefit from copyright protection if they represented a pictorial, graphic or sculptural work eligible for copyright protection on its own merits and possessed a minimal level of originality.

1.3. To protect or not to protect, that is the question

In the previous chapters it was established that the EU copyright regime offers a more expansive protection than its US counterpart. With the fashion industries in both territories booming,⁷¹ it is debatable whether the stringent EU copyrights serve their purpose, or is the almost *laissez-faire* US system equally efficient, yet less litigious in its nature. I would argue that more protection serves as a better incentive for genuine creativity than the very limited protection provided in the US, which incentivizes recycling other designers’ ideas⁷² and reaping the benefits of those designers’ creative efforts.⁷³

Proponents of the “piracy paradox” theory would surely disagree, emphasizing the negative effects of statutory protection to innovativeness leading to a stall in the fast-paced development

⁶⁶ Supra 38

⁶⁷ *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345, (1991), 358; *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2nd Cir. 1988)

⁶⁸ Ibid. (*Feist*)

⁶⁹ 37 Code of Federal Regulations §202.1(a)

⁷⁰ *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003-04 (2nd Cir.1995)

⁷¹ <https://www.statista.com/forecasts/758666/revenue-of-the-women-s-and-girls-apparel-market-worldwide-by-country>

⁷² Elizabeth Vulaj, Will fast fashion go out of style soon? How couture designers, celebrities, and luxury brands fighting back may change the future legal landscape for mass affordable retailers (2020) 36 Santa Clara High Tech Law Journal 197

⁷³ Tina Martin, Fashion Law Needs Custom Tailored Protection for Designs (2019) 48 University of Baltimore Law Review 453

of fashion.⁷⁴ Furthermore, they would argue that the lack of specific statute and a narrow protection in the US did not lead to diminishment of continuous creation of new styles, innovativeness thereof nor investments into the fashion industry.⁷⁵ Another argument of the piracy paradox proponents is that strengthened statutory protection would lead to an increase in litigation as designers become prone to seeking protection in court when backed by a clear, black-on-white statute granting them protection.⁷⁶ To address the abovementioned claims it could be said that, firstly, the piracy paradox does not address the fact that quick turnaround of fashion designs due to copying is not equally “beneficial” for all designers, e.g. small designer houses or unestablished designers that lack the manpower and financial means to follow the fast pace of innovation as easily as major fashion names.⁷⁷ Such designers might get stripped off their chance to become successful due to the financial detriment brought by copycats and the consequential need to keep producing incessantly. With regard to litigation, a more extensive protection of fashion designs in the EU has not led to an impactful increase in court cases.⁷⁸ While it would be oversimplified to correlate the number of cases solely to the extent or stringency of copyright rules, such low amount of litigation in the EU could be considered as an indication that the US courts would not experience a surge in cases (especially if taking into account that the cases involving copyrightable fashion features in the US did not overwhelm the courts either).⁷⁹

In addition, scholars have criticized the piracy paradox theory for its inability to address the issues brought by the development of technology.⁸⁰ With websites specialized in reporting styles from the runway, copycat “designers” gained access to original designs within 24 hours from their runway debuts,⁸¹ and, due to a lower standard of quality, became capable of introducing knockoffs to the market months before the original designers.⁸² With this in mind, the piracy paradox proponents’ claimed benefits of a quicker turnaround of fashion designs and

⁷⁴ Supra 48

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Supra 47

⁷⁸ Supra 46

⁷⁹ Alice Wickens, Design piracy in the United States: Time to fashion a remedy (2021) 24 The Journal of World Intellectual Property 55

⁸⁰ Susanna Monseu, European Design Rights: A Model for the Protection of All Designers from Piracy (2011) 48 American Business Law Journal 27

⁸¹ Lauren Howard, An Uningenious Paradox: Intellectual Property Protections for Fashion Designs (2008) 32 The Columbia Journal of Law & the Arts 333

⁸² Eric Wilson, Before Models Can Turn Around, Knockoffs Fly, <https://www.nytimes.com/2007/09/04/us/04fashion.html>

increased sales thereof dissipate, as the original authors of designs fail to reap any benefits for their work when their designs are preceded by cheaper knockoffs.⁸³

Finally, one question should be asked: is the failure to adopt a fashion-specific statute in the US in the name of innovation in fact hindering it? This is particularly relevant when it comes to small fashion houses and independent designers with limited means to fight potentially much more powerful copycats.⁸⁴ I already mentioned that such designers were disadvantaged from finding their places under the fashion sun due to the financial losses brought by knockoffs. This was proven by a 2017 study by profs. Gil Appel, Barak Libai and Eitan Muller that showed that a knockoff's entry to the market has a negative effect on the revenue of an original, especially if there is a major discrepancy between the price of the originals and the cheaper knockoffs.⁸⁵ In addition to direct losses, upon seeking redress for the misappropriations, unestablished designers in the US face prohibitively high attorney fees and litigation costs. For example, the US-based artist Tuesday Bassen had to pay 2000\$ of attorney fees when Zara misappropriated the design of her clothing pins and patches, only to have Zara dismiss her claims by stating that her designs were unlikely to be connected to Bassen and assuming that further litigation would be too costly for the artist.⁸⁶ Similar scenario happened to Gabriella Sanchez, an LA-based designer whose patches were copied by Zara and PacSun. She decided to take on litigation herself as attorney fees would have become too expensive, aware that she would be facing Zara's (or their parent company Inditex') and PacSun's fully prepared legal teams.⁸⁷ In addition to facing the financial losses and additional costs, another, usually underestimated, consequence of misappropriation is complete demoralization and discouragement from creating new designs. Carrie Anne Roberts, the designer behind the fashion label Mère Soeur upon appropriation of her signature design by the US company Old Navy stated that the stealing stripped her work of all meaning and felt "*really violating*".⁸⁸ Tuesday Bassen stated: "*It is always soul-crushing to see your work stolen, especially as an artist whose entire livelihood depends on compensation*

⁸³ Supra 72

⁸⁴ In the words of Karl Lagerfeld, copying "*can be very damaging for small firms, though for a house like Chanel, it means a lot less*"; <https://wwd.com/fashion-news/fashion-features/lauren-fined-by-paris-court-so-is-berge-1162425/>

⁸⁵ Gil Appel, Barak Libai, Eitan Muller, On the monetary impact of fashion design piracy (2018) 35 International Journal of Research in Marketing 591

⁸⁶ Supra 41

⁸⁷ Gabby Bess, How Fashion Brands Like Zara Can Get Away with Stealing Artists' Designs, <https://www.vice.com/en/article/nejwdz/how-fashion-brands-like-zara-can-get-away-with-stealing-artists-designs-tuesday-bassen>

⁸⁸ Ibid.

for said work”.⁸⁹ To sum up, while all designers investing time and efforts into creativity would benefit from a more stringent EU-type protection for the sake of continuous innovation, this argument is particularly apparent in the case of small designers which are poorly equipped to fight copycats.

⁸⁹ Dayna Evans, Talking With Tuesday Bassen About Her David Vs. Goliath Battle Against Zara, <https://www.thecut.com/2016/07/tuesday-bassen-on-her-work-being-copied-by-zara.html>

2. COPYRIGHT PROTECTION OF FASHION DESIGNS CUSTOMIZED VIA APPS

2.1. General observations

The chapters above displayed that the EU and the US have taken fairly dissimilar approaches to the issue of copyrightability of fashion designs, with more extensive protection offered in the EU, under the conditions that designs reflect the author's own choices and can be expressed in a clear and precise manner. The US opted for a narrow approach, limiting eligibility for protection to design features, and only if original, could be perceived separately from the utilitarian fashion item and qualify for fashion protection on their own merits.

However, both approaches tackle the fairly straightforward scenario of the copyrighted work representing the result of both mind and labor of the author. The game changes if a fashion garment is created via an app that enables pre-programmed clothing features to be assembled into a finished product by an app-user. The direct link between the author and the work is broken and few potential copyright owners emerge. Is copyright bestowed on the author of the design features programmed into the app? Or should the app-user, who used his creativity to assemble the final product, be considered as the author? Or the programmer who actually expressed the designer's idea on a medium? Could app-customized designs qualify for works of joint authorship? If the authorship issue is resolved, it is still questionable whether such design could be considered original and, therefore, qualified for copyright protection. These questions will be addressed in the following sub-chapters.

2.2. Authorship

While both the EU copyright directives and the US Copyright Act engage in regulating the author's rights, the term "author" is left undefined in both jurisdictions. The Berne Convention,⁹⁰ the oldest international instrument harmonizing copyright law, signatories of which are both the EU and the US, refers to the author as the person whose name appears on the work in the usual manner.⁹¹ When national laws define the author, it is commonly in an ambiguous manner.⁹² Prof. Jane Ginsburg, upon researching several civil- and common law jurisdictions to define the author, coined the following definition: "*an author is a human being*

⁹⁰ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)

⁹¹ Ibid., Art. 15

⁹² Jane Ginsburg, The Concept of Authorship in Comparative Copyright Law (2003) 52 DePaul Law Review 1063

who exercises subjective judgment in composing the work and who controls its execution” or alternatively “*a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work*”.⁹³ In addition, Ginsburg offered six guidelines for determining the author: firstly, the author is the conceptualizer and not the executioner; secondly, the more important the role of a machine is in creating a work, the more the author will have to show the cruciality of the author’s contribution, otherwise the work would not be considered original; thirdly, authorship and originality are closely connected; fourthly, when lacking creativity, sufficiently considerable amount of efforts could supplant it (however, this seems opposite to the CJEU’s jurisprudence, where the focus is always on creativity); fifthly, intent to create could assist in determining who is the author when multiple people claim their rights to a work and finally, economic control over the work (e.g. by employers or commissioners of the work) does not equate with authorship.⁹⁴

The issue of the author of an app-customized fashion design will now be analyzed in light of Ginsburg’s comprehensive guidelines. Firstly, from Ginsburg’s definition and guidelines it is clear that the programmer, i.e. the “executor” of the ideas, cannot be considered as the author. However, both the designer and the app-user exercise subjective judgement and minimal personal autonomy in creation of work, as well as assert control in its execution. Should they then be considered joint authors? I would argue otherwise. Namely, it is true that both the designer and the app-user are crucial for the design of the final product. However, their creativity and control are not exercised at the same point in production of a fashion garment nor on the same object: first the designer creates the design feature, following which the app-user arranges those features into either a new design feature or a fashion garment. Consequently, the designer is entitled to copyright over the design features, provided that said features fulfil other copyrightability criteria. The app-user, on the other hand, enjoys copyright protection over the arrangement of design features.

However, in light of the current EU and US copyright regimes, the app user’s enjoyment of copyright over the design arrangement could be more controversial than the designer’s. In the EU, the app-user’s arrangement could fulfill the copyrightability criteria stated in *Cofemel*, namely, that the customized fashion design represented the author’s own intellectual creation, especially in light of the CJEU’s broad interpretation thereof, and was capable of clear and

⁹³ Ibid.

⁹⁴ Ibid.

precise representation. However, in the US, protection is granted to design features, and not the utilitarian fashion garment in its entirety. Therefore, it is likely that copyright protection in the US would depend on the result of the app-user's arrangement: if the app-user's contribution is reflected in a design feature (e.g. the garment's final pattern that is a collage of the patterns offered by the app), copyright might be granted to the app-user over such features, but if the contribution is in the arrangement of the entire fashion garment, copyright will only exist within the elements provided by the designer and not over the entire arrangement.

2.3. The originality requirement

The next issue is whether app-customized designs are capable of fulfilling the originality criteria. As mentioned earlier, the EU originality standard introduced through *Infopaq* was that the work should exhibit the author's own intellectual creation. Further case law expanded on this notion by establishing that the work should allow its author "to express his creative abilities in the production of the work by making free and creative choices"⁹⁵ or "to express his creativity in an original manner".⁹⁶ The work should represent an "original expression of the creative freedom of its author"⁹⁷ or bear the author's "personal touch".⁹⁸

Designer of the features offered by the app certainly exercised their creative freedom while designing the features, thereby creating original works.⁹⁹ However, the CJEU's interpretation of what constituted original works is of little help when discussing whether the app-user's work can be considered original. Specifically, could it be said that the app-user expressed his creativity in an original manner or that the customized garment/design feature bore the app-user's personal touch? Yes, as the appearance of the end-design is the reflection of the customer's choices among offered selection. However, could it be said that the app user's choices were free, given the limited, pre-determined selection the app-user had had on his or her disposal? I would still argue so. Parallels could be drawn with e.g. an architect, whose choices of ornaments on a building are dictated by the laws of physics,¹⁰⁰ or with a composer

⁹⁵ C-145/10, *Eva-Maria Painer v Standard Verlags GmbH and Others*, ECLI:EU:C:2011:798, pars. 89, 94

⁹⁶ C-393/09, *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, ECLI:EU:C:2010:816, par. 50

⁹⁷ C-604/10, *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others*, ECLI:EU:C:2012:115, par. 45

⁹⁸ C-145/10, *Eva-Maria Painer v Standard Verlags GmbH and Others*, ECLI:EU:C:2011:798, par. 92

⁹⁹ It is clear that the designer is capable of expressing his or her creativity. However, whether such contribution could be considered original will be decided on a case-by-case basis.

¹⁰⁰ Parallels between architects and fashion designers have been analyzed by e.g. Scruggs (supra 5).

Additionally, the US Congress stated that "*architecture plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a work of art.*", the ratio of which could be extended to fashion designs as well

creating a special piece for an artist, whose limitations are set by the artist's capabilities. Architects and composers do not enjoy unlimited freedom but their authorial role is unquestioned.¹⁰¹ Such limited freedom exists with app-users as well. Therefore, I would argue that the app-user could produce an original work capable of copyright protection in the EU.

In the US, copyrighted work should possess a minimal degree of creativity. However, although this threshold is “*extremely low*”,¹⁰² it should not be neglected.¹⁰³ The question is how to interpret the minimal degree of creativity, is there a quantifiable threshold designers and app-users could rely on when seeking protection of their respective works? Case law established that relatively simple works could be eligible for protection.¹⁰⁴ Furthermore, as previously mentioned, a combination of unprotected basic and uncreative elements could result in a copyrightable design feature,¹⁰⁵ and courts should not base their decision on originality on the assessment of singular elements of the work, but rather on the work as a whole.¹⁰⁶ Furthermore, the US courts explained that the simple elements should be numerous enough and, especially, that the selection, coordination and arrangement of such simple elements should be original enough for the compilation to be considered as an original work.¹⁰⁷ In case the arrangement is so commonplace to be expected by the public as a matter of course, such arrangement would not benefit from copyright protection.¹⁰⁸ The best example of the low threshold arrangements of simple elements have to meet can be seen in *Prince Group, Inc. v. MTS Products*, where the US courts granted protection to polka dot pattern that was considered original due to the shading and slight irregularity of shape of the dots.¹⁰⁹ Also, courts deemed a polka dot pattern with dots of different sizes to be original.¹¹⁰ Therefore, it can be concluded that only very basic, simple and common designs (in the designer's case) or arrangement thereof (for the app-user) would be considered unoriginal and hence unqualified for copyright protection in the US.

¹⁰¹ In both cases, copyright protection is granted by international and national legislation, e.g. Art. 2 of the Berne Convention and 17 U.S.C. § 102(a), under (2) and (8)

¹⁰² Supra 68

¹⁰³ US Copyright Office's refusal to Register American Airlines Flight Symbol, <https://www.copyright.gov/rulings-filings/review-board/docs/american-airlines-flight-symbol.pdf>

¹⁰⁴ *Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600 (1st Cir.1988), *Runstadler Studios, Inc. v. MCM Ltd. Partnership*, 768 F. Supp. 1292, 1298 (N.D. Ill. 1991)

¹⁰⁵ *Key Publications, Inc. v. Chinatown Today Publications Enters., Inc.*, 945 F.2d 509, 512 (2d Cir. 1991)

¹⁰⁶ *Diamond Direct, LLC v. Star Diamond Group, Inc.*, 116 F. Supp. 2d 525, 528 (S.D.N.Y. 2000)

¹⁰⁷ Supra 68; *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)

¹⁰⁸ Supra 68

¹⁰⁹ *Prince Group, Inc. v. MTS Products*, 967 F. Supp. 121 - Dist. Court, SD New York 1997

¹¹⁰ *Olem Shoe Corp. v. Washington Shoe Corp*, No. 13-14728

In conclusion, both the designer of design features pre-programmed into the app and the app-user that arranged the design features could be considered as the authors of their respective works if their works were considered original, for which the threshold in the EU and the US is low. This is especially good news for smaller fashion houses with business models revolving around app-based customization. With the costs of app development starting from app. 100.000\$,¹¹¹ plus the costs of developing the fashion garments, it is conceivable for designers to be motivated to protect their investments, particularly given their susceptibility to misappropriation by established designers as seen from the previous chapter.

However, it should be borne in mind that the app-user's copyright in the US is limited to an original arrangement of design features resulting in a new design feature, and does not extend to the fashion garment itself. With the app-user's investment into the garment being relatively small, especially compared to the legal fees in the US, it is less likely that app-users would initiate litigation to protect only a feature in their total design.

¹¹¹ App Development Costs: \$1,000 App vs. \$10,000 App vs \$100,000 App (What's The Difference?), <https://buildfire.com/app-development-costs-difference/>; Michael Georgiou, How Much Does It Really Cost to Build a Custom Mobile App? Estimation 2021, <https://www.imaginnovation.net/blog/how-much-does-it-cost-to-build-mobile-app/>

3. PROTECTION OF APP-CUSTOMIZED FASHION DESIGNS BY OTHER INTELLECTUAL PROPERTY RIGHTS

The final question explored is whether copyrights are best suited to protect app-customized fashion designs. Despite both designers and app-users eligible for the enjoyment of copyrights over their respective works, the question remains whether the scope of bestowed protection would be considered satisfactory, particularly given the correlation between the levels of protection and originality of works. In the US, it was established that where the minimal threshold of originality has barely been met, such designs are entitled only to the so-called “thin” protection that might prevent identical copying, but hardly anything else.¹¹² Similarly, in the EU, the less original the work is, the narrower protection it obtains.¹¹³ Fashion garments traditionally enjoy a low level of originality due to a limited number of fashion design features and fabrics designers can choose from, especially if trying to follow style trends,¹¹⁴ and the regular borrowing of ideas from earlier designs.¹¹⁵ Therefore, it is questioned whether designers and/or app-users should rely on copyrights for the protection of their designs or would other IP rights be better suited to the fulfillment of the aim copyright is trying to achieve. The most commonly advocated alternatives are industrial designs and trademarks, viability of which will be assessed in turn.

3.1. Industrial designs/Design patents

Industrial design rights entail protection of an outer appearance or aesthetic features of a product.¹¹⁶ With its underlying aim similar to that of copyright, i.e. to prevent design misappropriation while preserving room for creativity and innovation,¹¹⁷ such protection at first glance seems eligible to support copyright in fashion designs. However, the protection of an outer appearance of a product somewhat diverges in the EU, where it is protected under a *sui generis* right, and the US, where it falls under patent protection (the so-called design patents).

¹¹² Supra 107 (*Satava*)

¹¹³ In the words of prof. Mireille van Eechoud, commenting on *Painer*, finding an infringement is less likely when “*there is little originality to copy*”

¹¹⁴ In the words of Raustiala and Sprigman: “*...there is one verity in fashion, it is that some styles are hot, and others are not, and the styles in vogue are constantly changing*”

¹¹⁵ Alissandra Burack, Is Fashion an Art Form That Should Be Protected or Merely a Constantly Changing Media Encouraging Replication of Popular Trends (2010) 17 Villanova Sports & Entertainment Law Journal 605

¹¹⁶ WIPO, Frequently Asked Questions: Industrial Designs, https://www.wipo.int/designs/en/faq_industrialdesigns.html

¹¹⁷ Susanna Monseau, The Challenge of Protecting Industrial Design in a Global Economy (2012) 20 Texas Intellectual Property Law Journal 495

Consequently, their definitions and protection requirements do not completely coincide.¹¹⁸ Regarding the definitions discrepancy, the EU defines an industrial design protection as the protection of the appearance of the whole product or its part, resulting from the features of the product and/or its ornamentation. Such features are especially lines, contours, colors, shapes, textures or materials.¹¹⁹ US design patents, on the other hand, consist of “*visual ornamental characteristics embodied in, or applied to, an article of manufacture*”, be it configuration or shape of a product, surface ornamentation applied thereto, or a combination thereof.¹²⁰

I would argue that there are two features of industrial design protection that reflect a higher degree of protection for fashion designs in the EU than in the US. Firstly, the EU recognizes¹²¹ registered designs, protection of which can last up to 25 years, and unregistered designs, valid for 3 years as of the date of its disclosure to the public.¹²² On the other hand, design patents in the US have to be registered, and their protection lasts for 15 years as of the date of registration.¹²³

A second major difference may be found in the number of requirements for obtaining protection. EU law envisaged two prerequisites for protection of an industrial design: novelty, meaning that no identical design was made available to the public,¹²⁴ and individual character, meaning that a particularly observant user¹²⁵ of the industrial design must be left with an overall impression different from the overall impressions left by industrial designs already made available to the public.¹²⁶ Similarly to the copyright’s originality issue, one of the major questions in the fashion industry was whether it was possible for a fashion garment to possess individual character, given the limited number of options available to designers upon designing their garments, and that designers commonly find inspiration in another designer’s earlier work. This issue was resolved in the CJEU’s *Karen Miller* case,¹²⁷ where Karen Millen Fashions Ltd

¹¹⁸ Lena Schickl, Protection of Industrial Design in the United States and in the EU: Different Concepts or Different Labels? (2013) 16 The Journal of World Intellectual Property 15

¹¹⁹ Community Design Regulation (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs OJ L 3, 5.1.2002, p. 1–24) Art. 4; EU Design Directive (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, p. 1–24) Art 3.

¹²⁰ USPTO, Design Patent Application Guide, <https://www.uspto.gov/patents/basics/types-patent-applications/design-patent-application-guide#def>

¹²¹ Albeit valid only for community designs, the issue of unregistered designs has not been harmonized across the EU

¹²² Community Design Regulation Art. 11

¹²³ 35 U.S. Code §173

¹²⁴ Community Design Regulation Art. 5; EU Design Directive Art. 4

¹²⁵ As defined by the case C-281/10 P, PepsiCo, Inc. v Grupo Promer Mon Graphic SA, ECLI:EU:C:2011:679

¹²⁶ Community Design Regulation Art. 6; EU Design Directive Art. 5

¹²⁷ C-345/13, Karen Millen Fashions Ltd v Dunnes Stores (Limerick) Ltd, ECLI:EU:C:2014:2013

sued Dunnes Stores (Limerick) Ltd for infringing their unregistered community designs by selling under their own name tops and blouses identical to Karen Miller designs. Dunnes admitted to copying, but claimed that Karen Miller's unregistered industrial designs were invalid as they did not possess individual character, but rather represented an arrangement of elements taken from earlier collections of other designers. The CJEU decided in favor of Karen Miller and confirmed that the overall impression left by the industrial design must be observed in relation to the product as a whole, instead of summing up the individual characters of its elements.¹²⁸ Furthermore, according to the CJEU, the designer claiming infringement of their community designs did not have to prove the validity of their unregistered community designs nor the existence of the individual character, but only had to indicate the elements that give the designs their individual character.¹²⁹

In light of the abovementioned, it can be concluded that designers and app-users could consider industrial design protection as a viable alternative to copyright protection in the EU, with its optional registrability,¹³⁰ fairly straightforward prerequisites and the lack of necessity to prove the validity of the industrial designs in litigation as established in *Karen Miller* (whereas the originality requirement in copyright infringement cases is frequently challenged). A hurdle for industrial design protection, especially in relation to app-users, might be that such protection does not extend to the features of appearance of a product solely dictated by the product's technical function.¹³¹ Further guidance thereon can be found in the reasoning of the Board of Appeal of the European Union Intellectual Property Office: if the features were not chosen to enhance the product's appearance at least to some degree, such features are considered technical.¹³² However, such elements would unlikely benefit from copyright protection either.

With all the above taken into consideration, industrial design protection might, in many cases, not only represent a viable alternative to copyright, but also a better solution for the protection of fashion designs, particularly due to choice between registered and unregistered designs. Designers might opt for registered designs for their signature design features that would benefit from a formal registration in case of litigation, as well as a longer period of protection. Both designers and the app-users might consider unregistered industrial design rights sufficient for

¹²⁸ Ibid., par. 35

¹²⁹ Ibid., par. 49

¹³⁰ E.g. Designers of the so-called "fast fashion" might be more interested in pursuing a cost-free three-year unregistered design protection.

¹³¹ Community Design Regulation Art. 8; EU Design Directive Art. 7

¹³² R 690/2007-3 Lindner Recyclingtech GmbH v Franssons Verkstader

their needs, requiring no registration costs and arising automatically upon making the design available to the public, but with a shorter period of protection and covering only infringements made in bad faith.¹³³

Even though unregistered rights have their advantages, particularly for fashion designs that require cheaper but shorter protection, a study conducted in the EU showed that registered designs are more common than unregistered, and that they serve as a basis for 47% of IP infringement cases, compared to copyright-based 18% and only 6% unregistered design-based.¹³⁴ One of the potential reasons for the underutilization of unregistered designs are the costs of enforcement which outweigh the benefits of the relatively short term of protection.¹³⁵ Nevertheless, when returning to the main goal of industrial design protection, i.e. striking a balance between protection and future innovation, I would argue that the short-term unregistered industrial designs might be better suited for this goal than the 70+ years of copyright protection, especially if taking into consideration seasonality as one of the most common characteristics of fashion designs, and more designers should become aware of their potential.

The story is different in the US, where designers and app-users might be discouraged from seeking design patent protection. Namely, to benefit therefrom, fashion designers have to prove their design's novelty, non-obviousness, originality, ornamental nature and usage in an article of manufacture.¹³⁶ This lengthy list of requirements, sometimes unsuited to designs,¹³⁷ led scholars to criticize design patent protection as overly challenging.¹³⁸ With regard to designers and app-users, I would emphasize two points that show supremacy of copyright to design patent protection in the US, in spite of copyright's limitations as described earlier. Firstly, the originality and ornamental nature required for design patents correspond to the originality and non-functional nature requirement for copyrights;¹³⁹ therefore, all issues regarding non-functionality stated for copyrights will apply for design patents. Furthermore, delimiting the aesthetic from functional features in design patents has commonly shown to reflect the

¹³³ <https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union>

¹³⁴ Europe Economics, The Economic Review of Industrial Design in Europe-Final Report; https://ec.europa.eu/growth/content/economic-review-industrial-design-europe-0_en

¹³⁵ Ibid.

¹³⁶ Supra 123

¹³⁷ E.g. the interpretation of the novelty and non-obviousness requirements were considered better suited for cutting-edge innovations protected by utility patents than designs

¹³⁸ Supra 118

¹³⁹ Ibid.

examiner's or the court's subjective opinion and led to significant legal uncertainty.¹⁴⁰ The main shortcoming of design patent protection, ultimately contributing to its unviability is, in my view, reflected in its length of protection. Namely, it is unlikely that designers or app-users would be motivated to jump such hurdles for fifteen-year long design patent protection, when copyright protection offers a significantly longer period of protection with lesser burdens attached thereto.

To conclude, while the EU industrial design protection could be considered as an adequate alternative to copyright protection, even potentially striking a better balance between protecting current innovations while encouraging future ones than copyrights, the same cannot be said about the US design patent protection where copyright shows its supremacy.

3.2. Trademarks

Trademarks arguably offer the most flexible source of protection for fashion designs.¹⁴¹ There are no limitations on the object of trademark registration, it could be a 2D fabric print or a 3D design element (or the finalized clothing garment itself), as long as the trademark serves as an indication of its source.¹⁴²

The trademark regime in the EU allows registration of all signs, including 2D designs, shapes of products or the packaging thereof if such signs were capable of distinguishing the goods or services of one undertaking from those of other undertakings and could be represented in a clear and precise manner.¹⁴³ However, a potential impediment for trademark registration of fashion designs lies in the provisions that prohibit registration of signs devoid of any distinctive character,¹⁴⁴ i.e. lacking capacity to identify the goods or services for which it has been registered as coming from a particular undertaking.¹⁴⁵ With many designers following trends and their designs thus resembling each other, consumers might recognize the trend in question

¹⁴⁰ Ibid., citing Uma Suthersanen, *Design Law: European Union and United States of America*, 2nd edition (2010) Sweet and Maxwell, London

¹⁴¹ Susan Scafidi, *Intellectual Property and Fashion Design* (2006) 1 *Intellectual Property and Information Wealth* 115

¹⁴² Daniel J. Gifford, *The Interplay of Product Definition, Design and Trade Dress* (1991) 75 *Minnesota Law Review* 769

¹⁴³ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, p. 1–99 Art. 4; Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ L 336, 23.12.2015, p. 1–26 Art. 3

¹⁴⁴ European Trademark Regulation Art. 7(1)(b), European Trademark Directive Art. 6(1)(b)

¹⁴⁵ C-342/97, *Lloyd Schuhfabrik*, EU:C:1999:323, par. 22

rather than connect the design to a particular designer.¹⁴⁶ Furthermore, if the entire garment is aimed to be registered, customers rarely consider this as an indication of a specific designer rather than a functional object.¹⁴⁷ A remedy for the lack of distinctiveness entails showing that the design acquired distinctive character through, usually long-standing,¹⁴⁸ use,¹⁴⁹ and proof of which requires time, efforts and funds to collect.

In the US, a special type of trademark for a 3D design is called trade dress,¹⁵⁰ which protects the design and appearance of a product, including its shape, size, color, texture etc., if such design or appearance were capable of indicating the producer of the product.¹⁵¹ To be granted trade dress protection, products have to be distinctive.¹⁵² As in the EU, distinctiveness requirement was shown to be problematic for fashion designs as designs rarely served the purpose of identifying their producers.¹⁵³ As a result, designers often had to rely on acquired distinctiveness to enjoy trade dress protection.¹⁵⁴

Apart from proving acquired distinctiveness, another obstacle designers and app-users might face in the EU and the US may be found in the functionality doctrine, which prohibits registration of trademarks, including trade dress, that would allow a single trademark owner to monopolize features of a useful product,¹⁵⁵ including features necessary for the use or purpose of the product or features impacting the cost or quality of the product.¹⁵⁶ In the EU, the functionality doctrine is reflected in the prohibition of registration of shape marks that consist exclusively of shapes or another characteristics that result from the nature of the product itself, that are necessary to obtain a technical result or that give substantial value to the product.¹⁵⁷

¹⁴⁶ Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams* (2008) 65 *Washington and Lee Law Review* 215

¹⁴⁷ Jacopo Ciani, Gustavo Ghidini, Violet Atkinson, William Van Caenegem, *A Comparative Study of Fashion and IP: Non-traditional Trademarks in Italy and Australia* (2019) 50 *IIC International Review of Intellectual Property and Competition Law* 1101

¹⁴⁸ EUIPO, *Guidelines for Examination in the Office*, Part B, Examination

¹⁴⁹ European Trademark Regulation Art. 7(3), European Trademark Directive Art. 6(3)

¹⁵⁰ According to US case law, trade dress is considered a trademark under 15 U.S.C. § 1114 as the term “trademark” includes, among other, symbols or devices

¹⁵¹ *U-Neek, Inc. v. Wal-Mart Stores, Inc.*, 147 F. Supp. 2d 158, 171 (S.D.N.Y. 2001), *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir.1991)

¹⁵² *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992)

¹⁵³ Showing inherent distinctiveness of fashion designs might prove challenging in the EU as well

¹⁵⁴ 15 U.S. Code §1052

¹⁵⁵ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995)

¹⁵⁶ *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844 (1982)

¹⁵⁷ EU Trademark Regulation Art. 7(3)(e), EU Trademark Directive Art. 4(1)(e)

The benefits of obtaining a trademark or a trade dress registration, under the proviso that the designs are considered non-functional and inherently distinctive, are numerous: fairly simple and quick registration process, potential of territorially wide scope of protection, possibility of obtaining protection even before the garments are created, and the length of protection, which could last in perpetuity. However, as seen from the above, the simplicity of the process will likely be skewed if designers and app-users become obligated to prove acquired distinctiveness of their designs. Not only is it time-consuming and burdensome to collect sufficient proof of acquired distinctiveness, the expenses related thereto could be enough to dissuade the designer or the app-user from pursuing trademark protection.¹⁵⁸ Secondly, acquired distinctiveness requires investment into educating consumers of the fashion garment's secondary meaning (e.g. by means of catalogues, brochures, advertisements, etc.) which would have to be backed by invoices, annual reports, customer surveys etc. in the trademark registration proceedings.¹⁵⁹ Designers, and especially app-users, might not be in possession of such materials. And finally, it takes time for a trademark to acquire a secondary meaning in consumers' minds. This would mean that the design feature or the fashion garment would have to be used for a longer period of time without any protection, allowing copycats abundant time for appropriation thereof. Therefore, if designers or app-users designed a unique, distinctive feature or fashion garment, trademark protection might present an appropriate alternative to copyright protection. However, in the likelier case where design features or the fashion garments were not distinctive, designers and app-users would have to weigh the difficulties in proving acquired distinctiveness against the benefits of trademark protection, likely resulting in a lack of motivation to go through the registration process due to high costs and low likelihood of success. Specifically, for designers the registration procedure would require a very costly endeavor to prove distinctiveness of every single design feature offered by the app. Furthermore, in order to appease to a higher number of app-users, most design features would likely be generic and similar to features offered by other designers, resulting in designers' futile efforts to prove their distinctiveness. With regard to app-users, while their end-designs might seem more eligible for acquired distinctiveness due to their higher potential for uniqueness, registration would still often be unattainable due to the lack of available evidence such as invoices, ads, surveys, etc., which the app-user, usually the end-consumer, cannot be in possession of. Furthermore, registration procedure and trademark upkeep are costly and would immensely raise the end-price of the

¹⁵⁸ Julie P. Tsai, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States* (2005)

9 *Lewis & Clark Law Review* 447

¹⁵⁹ *Supra* 148

product. The app-users' motives to seek trademark protection are questioned, when the chances of success are slim and, even if successful, the reward for the expensive and demanding process is limited to barring others from exploiting the same or highly similar fashion garment, which is usually a minor problem, if at all, in most consumers' lives.

TO PROTECT OR NOT TO PROTECT REVISITED

Copyright law regimes have been criticized as unsatisfactory and inappropriate for the protection of fashion designs. Such criticism is likely to intensify with the fashion industry exceedingly embracing the use of technology, e.g. by introducing applications that enable app-users to customize their clothes upon purchase. This thesis analyzed whether such app-customized fashion designs fulfilled the legal criteria for copyright protection in the EU and the US. Furthermore, it discussed whether copyright or other intellectual property rights, namely trademarks and industrial designs/design patents, would better meet the author's needs and expectations in case of fashion design misappropriations, while also achieving the best balance between providing protection of existing fashion designs and leaving sufficient space to produce new and innovative fashion creations.

Compared to its European counterpart, copyright protection of fashion designs in the US is significantly more limited. Nevertheless, I argued that both copyright regimes could extend to app-customized designs: designers could enjoy copyright protection over the design features pre-programmed into the app and the app-users over the arrangements of said design features, all provided that other copyrightability criteria are fulfilled. While the design features and the arrangements thereof could be capable of meeting the necessary originality level in the EU and US, in the US the app-user's copyright would be limited only to an original arrangement of design features that result in a new design feature, and not the entire fashion garment. In addition, both in the EU and the US the designers and the app-users could be disappointed with the level of copyright protection awarded for fashion designs characterized by a low level of originality, which might incentivize said authors to rely on other potentially available IP rights.

In that regard, I argued that only EU industrial design rights could be considered as an adequate alternative to copyrights. In addition, the three-year protection of unregistered industrial designs struck the best balance between providing protection and incentivizing innovation as the extensive 70+ year-long copyright protection erred on the side of protection of commonly short-lived, seasonal and trend-dependent fashion designs to the detriment of space for future creations. On the other hand, the US design patent protection would not present a viable alternative to copyright due to the number of potentially challenging registration requirements that would likely discourage designers and app-users from initiating the registration procedure. Similarly, if pursuing trademark registrations, designers and app-users would likely be deterred by the time, efforts and funds necessary to prove acquired distinctiveness of their trademark

applications. Although the attempt to show that the designs obtained a secondary meaning in the consumers' eyes would likely fail, even if successful, the rewards from trademark registration would probably be irrelevant, especially for app-users.

Finally, in light of all the abovementioned, with the fashion industry thriving and customized fashion trending both in the EU and the US despite the highly discrepant approaches to protection, one might question whether more protection is needed, particularly in the US, should legislators and courts stick to the *status quo*, or should protection be reduced in the name of innovation. While there is no definitive or one-size-fits-all answer, to me it seems that the inventiveness-driven US copyright regime, characterized by claims that statutory protection would stall the fast-paced development of fashion and would overwhelm the courts with an influx of cases, drew criticism from both designers and scholars for the low level of protection and in fact served as a hindrance towards the goal it was trying to achieve, while showing no evidence that either of said claims would come true. In fact, in the world where copying designs of others has become easier than ever due to technological advances, lack of statutory protection left designers exposed to financial losses, perpetual creation of new designs and states of personal disheartenment. On the other hand, the European "dual" regime characterized by overlap between copyright and industrial design protection, struck a better balance between incentivizing innovation and leaving enough room for it. This is particularly palpable for small fashion houses or unestablished designers that lacked financial means and manpower to create constantly and are especially vulnerable to misappropriation. With the EU copyright extended to original fashion designs in their entirety (including their cut, shape and physical characteristics) and EU industrial design protection being more flexible due to optional registration and designer-friendly due to the lack of necessity to prove the validity of the industrial design in litigation, the EU tried to reconcile the protection of originality and innovation embedded in fashion designs and free use of utilitarian features thereof. However, a notable mention should be given to unregistered industrial rights, the short length of which might be particularly suited to fashion designs' susceptibility to trends.

Another good indicator in support of the European dual regime is the public recognition and acclaim of *Cofemel* and *Karen Miller* decisions by the fashion industry, scholars and national courts that readily embraced their application to national court cases. Therefore, I expect that the fashion industry, both traditional and technology-focused, would benefit from broader protection of fashion designs similar to the EU one without significantly sacrificing future innovation.

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